

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 7, 2008 Session

**CHRISTINE SMARTT, ET AL. CO-EXECUTORS OF THE ESTATE OF
CHEATUM MYERS v. NHC HEALTHCARE/MCMINNVILLE, LLC,
ET AL.**

**Appeal from the Circuit Court for Warren County
No. 2182 Larry B. Stanley, Judge**

No. M2007-02026-COA-R3-CV - Filed February 24, 2009

Plaintiffs, executrixes of their father's estate, filed general negligence and medical malpractice claims against a nursing home and related entities for injuries arising out of his stay at the nursing home and for his death. At trial, the Circuit Court denied the defendants' motions for directed verdict, seeking dismissal of all claims because they owed no duty of care to the plaintiffs' father and seeking dismissal of the negligence claim because all alleged conduct was governed exclusively by the Medical Malpractice Act; the jury was permitted to consider liability on all issues against all defendants. Defendants appeal this decision of the trial court, and also appeal the jury award of compensatory damages as excessive and the court's award of discretionary costs as improper. Plaintiffs cross-appeal, contending that the trial court's grant of a directed verdict in favor of two defendants on the issue of punitive damages was in error. We vacate a portion of the compensatory damage award, finding it to be unsupported by the evidence. We reverse the trial court's order granting defendants a directed verdict on the issue of punitive damages and remand the case for a hearing on same. We modify the award of discretionary costs. In all other respects, the judgment of the Circuit Court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in part,
Vacated in part, Modified in part and Remanded**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S. and ANDY D. BENNETT, J., joined.

John B. Curtis, Jr., Cherie D. Jewell, and Bruce D. Gill, Chattanooga, Tennessee, attorneys for the Appellants, NHC Healthcare/McMinnville, LLC, d/b/a NHC Healthcare, McMinnville; National Healthcare Corporation; and National Health Corporation.

Lisa Circeo, Susan Nichols Estes, and Deborah Truby Riordan, Little Rock, Arkansas, attorneys for the Appellees, Christine Smartt and Ruby Kilgore, as Co-executors of the Estate of Cheatum Myers.

OPINION

I. Procedural History

On June 21, 2005, Christine Smartt, as next friend of her father Cheatum Myers, filed suit against a nursing home (“Facility”) and its related entities for ordinary negligence and medical malpractice; she also asserted claims under the Tennessee Adult Protection Act. Following Mr. Myers’ death on August 24, 2005, an amended complaint was filed to include a claim for wrongful death; the amended complaint also added Ruby Kilgore, Mr. Myers’ other daughter, as a plaintiff. The plaintiffs sought compensatory and punitive damages for injuries sustained by Mr. Myers during his stay at the Facility, including pressure ulcers, falls, bruises and abrasions, compression fractures of the spine, left hip fracture, urinary tract infections, weight loss, conjunctivitis and poor hygiene, as well as his death.

NHC Healthcare/McMinnville, LLC (“NHC/McMinnville”) is a limited liability company which owns and operates the Facility. National Healthcare Corp. (“NHC”) is the parent corporation of NHC/McMinnville. NHC/OP is a wholly owned subsidiary of NHC and serves as the sole member of NHC/McMinnville. NHC/McMinnville, NHC, and NHC/OP were the original defendants in the case. NHC/DE, a wholly owned subsidiary of NHC and general partner of NHC/OP, was added as a defendant in the first amended complaint. National Health Corporation (“National”), a corporation that contracted with NHC to provide staff to the Facility,¹ was added as a defendant in the second amended complaint. National Healthcorp, L.P. and NHC, Inc. were named as defendants in the original complaint, but were voluntarily dismissed prior to trial.

Prior to trial, the court granted the defendants’ motion to dismiss the plaintiffs’ claims under the Tennessee Adult Protection Act. The defendants also moved for, and the trial court granted, a bifurcation of the trial on the issue of punitive damages pursuant to the Tennessee Supreme Court’s decision in *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). Following the plaintiffs’ case-in-chief, all defendants moved for a directed verdict on the issue of liability. The trial court granted the motion in favor of NHC/OP and NHC/DE only, finding that neither entity owed a duty of care to Mr. Myers.²

After the close of all the evidence, the remaining defendants moved for a directed verdict on the issue of the duty owed to Mr. Myers by NHC and National; moved for a directed verdict on the ordinary negligence claim, contending that all the alleged conduct fell under the Medical Malpractice Act; and also moved for a directed verdict on the issue of punitive damages. The trial court denied the motions for a directed verdict on the duty and negligence/medical malpractice claim issues, but granted NHC’s and National’s motion for directed verdict on punitive damages, ruling that:

¹ The president of NHC also serves as the president of National.

² The grant of a directed verdict in favor of NHC/OP and NHC/DE is not contested on appeal. Thus, any mention hereafter of “Defendants” in this opinion refers only to NHC/McMinnville, NHC, and National, collectively. If referring to one defendant individually, the particular defendant will be designated by name.

...I cannot find that their actions or inactions were reckless in what they did. They did meet the minimum state standards. I'm not sure that what they knew and what they didn't do because of it was grossly inadequate or reckless in the terminology that we are required to use.

The people there at the facility, yes, I think the people - the manager there at the facility, yes, we can say that there is sufficient evidence to warrant punitive damages. I simply cannot find that there is clear and convincing evidence of reckless and/or gross deviations by the above corporations.

During the first phase of the bifurcated trial, the jury found in favor of the plaintiffs and returned a verdict of \$820,459.77 in compensatory damages on the negligence claim and \$3,281,839.09 in compensatory damages on the medical malpractice claim against all defendants.³ The jury found that the defendants were not liable for wrongful death under either claim. The court entered judgment on the verdict against all defendants, jointly and severally.⁴ Lastly, notwithstanding the directed verdict on punitive damages previously granted, the trial court permitted the jury to consider liability for punitive damages against all defendants, assertedly to avoid a potential retrial should the granted directed verdict motion be reversed on appeal.⁵ The jury returned a finding that such damages were warranted against all defendants.

The trial then moved to the second phase to determine the amount of punitive damages to be awarded. The court allowed the jury to consider an award of punitive damages against each defendant. Following the presentation of evidence by both parties, the jury awarded punitive damages in the amount of \$163,402 against NHC/McMinnville, \$1,000,000 against NHC, and \$28,635,000 against National. The trial court entered judgment for the plaintiffs on the punitive damage award against NHC/McMinnville, omitting the awards against NHC and National pursuant to its previously granted directed verdict. All parties raise numerous issues on appeal.

³ The compensatory damage amount for negligence was divided into: \$450,000 for pain and suffering; \$275,000 for loss of the ability to enjoy life; \$75,000 for disfigurement; and \$20,459.77 medical care/services. The compensatory damage amount for medical malpractice was divided into: \$2,000,000 for pain and suffering; \$700,000 for loss of the ability to enjoy life; \$500,000 for disfigurement; and \$81,839.08 for medical care/services.

⁴ The Final Order entered judgment "jointly and severally through agreed stipulation of the parties..." The jury verdict form reflects that the jury found negligence and medical malpractice on the part of each defendant and that the negligence and malpractice was the proximate cause of damages or injuries sustained by Mr. Myers.

⁵ In ruling on the motion for directed verdict, the trial court stated that "...I'm going to let this issue go to the jury in case I'm wrong...I'm going to let the jury verdict form state and recite the punitive damages aspect of the claims against National Health Corporation and National HealthCare Corporation as well as NHC/McMinnville. In the event I am wrong, I don't think that that can hurt for purposes of retrial."

II. Factual Background

Cheatum Myers was 88 years-old at the time of his admission to the Facility on March 5, 2004; he remained there until July 8, 2005. Dr. Linda Foster, Mr. Myers' primary care physician at the Facility, testified that, upon his admission to the Facility, Mr. Myers was suffering from extreme weakness, falling, episodes of unresponsiveness, syncopal episodes, a fractured right shoulder due to a fall, decreased vision, depression, delusions, wandering, visual hallucinations, incontinence, peripheral vascular disease, and severe COPD. She also noted that his nutritional status was poor, that he was thin, and that his muscles were wasting. A care plan was created for Mr. Myers, which included physical therapy and a safety assessment. The purpose of the safety assessment was to reduce his risk of injury by lowering the bed closer to the floor, placing a call button within his reach, keeping his room well-lit, and removing clutter from his room. Despite these safety precautions, the Facility was unable to prevent Mr. Myers from moving on his own, which resulted in a number of falls. At one point, the Facility attached an alarm to Mr. Myers to alert the staff when he was getting out of bed; however, he discovered how to disable it.

One of these falls occurred on January 31, 2005, when Mr. Myers was found on the floor covered in his own feces. As a result of the fall, Mr. Myers complained of pain in his hip; an x-ray obtained seven days later revealed a fracture to the hip. An orthopaedic specialist wanted Mr. Myers to be non-weight bearing, however, the certified nursing assistants ("CNAs") were not informed of this restriction. Mr. Myers continued to walk on his injured hip until it eventually broke completely and was displaced. Mr. Myers was admitted to a hospital to receive hip replacement surgery on February 15, 2005.

Upon readmission to the Facility, Mr. Myers was placed on Station I, a wing designated for residents needing the most care, because the surgery had left him immobile and in need of constant care. Mr. Myers needed help with custodial services, such as feeding, bathing, shaving, grooming, and turning and repositioning. The station, however, was unable to perform these services as often as was required; for example, in lieu of a full bath, the CNAs would provide "spit baths" to the residents, which consisted of washing the face, underarms, and genital area. While visiting their father, the plaintiffs would find him to be unshaven, unbathed, and with long, dirty fingernails. The plaintiffs and several CNAs testified that Mr. Myers would be left to sit in his own urine and feces so long that it would dry to his body and the bed linens.

In addition to the lack of custodial services, Mr. Myers suffered from a number of medical problems. Mr. Myers developed pressure sores to his feet. The pressure sores could have been prevented by repositioning and by fitting him with "bunny boots" (a pressure relieving device); however, Mr. Myers would constantly be found without his bunny boots on. As a result, Mr. Myers suffered from a number of the pressure sores, including one to his right heel that devoured the skin and muscle tissue, exposing the bone.

Mr. Myers also suffered contractures to both his legs, a condition which caused his limbs to become stiff and disfigured. The contractures could have been prevented by range of motion

exercises, which was not done. One of the plaintiffs testified that the contractures made it difficult to place him inside his coffin.

Lastly, Mr. Myers suffered from a urinary tract infection. He was already at an increased risk of contracting the infection due to the use of a Foley catheter after his hip replacement surgery, but the risk could have been reduced if the catheter was consistently cleaned. At one point, a CNA observed pus or discharge on Mr. Myers' penis and that the catheter appeared cloudy.

On Mr. Myers' last day at the Facility, July 8, 2005, staff members observed that he exhibited shortness of breath, elevated blood pressure and pulse, and a temperature of 100 degrees. Mr. Myers was transported to the hospital where he was diagnosed with bilateral pneumonia, hypotension and urosepsis. He also suffered a heart attack while at the hospital. Mr. Myers' condition improved, and he was discharged later that month; he did not return to the Facility. Mr. Myers subsequently passed away on August 24, 2005.

III. Statement of the Issues

On appeal, the defendants raise the following issues:

1. Whether the trial court erred in denying NHC's and National's motion for a directed verdict on the ground that they owed no duty of care to Mr. Myers.
2. Whether the trial court erred in allowing the jury to separately consider a claim for ordinary negligence and a claim for medical malpractice when all the alleged conduct fell entirely within the Medical Malpractice Act.
3. Whether the trial court erred in admitting alleged improper evidence and argument that prejudiced the jury so as to require a new trial.
4. Whether the amount of the jury's combined award of compensatory damages under the claim for negligence and the claim for medical malpractice is excessive so as to necessitate a remittitur.
5. Whether improper extraneous information was introduced into jury deliberations so as to prejudice the jury and require a grant of a new trial.
6. Whether NHC/McMinnville's actions reached the required level of recklessness to warrant an award of punitive damages.
7. Whether the trial court erred in awarding the costs of the preparation of trial transcripts for appellate review since the discretion to award such costs is solely within the authority of the appellate courts.

On appeal, the plaintiffs raise one issue:

1. Whether the punitive damage award against NHC and National should be reinstated or the plaintiffs granted a re-trial on the punitive damages issue, because the trial court improperly granted a directed verdict motion in favor of NHC and National.

IV. Analysis

A. Duty Owed to Mr. Myers by NHC and National

NHC and National challenge the trial court's denial of their motion for directed verdict on the issue of whether or not they owed a duty of care to Mr. Myers, contending that they had no direct or vicarious liability for the injuries Mr. Myers sustained. Both NHC and National concede that NHC/McMinnville owed a duty of care to Mr. Myers, and both defendants stipulated to being held jointly and severally liable for any compensatory verdict.

The Tennessee Supreme Court in *Johnson v. Tennessee Farmers Mut. Ins. Co.*, 205 S.W.3d 365 (Tenn. 2006) addressed the standard of reviewing a trial court's denial of a directed verdict:

In reviewing the trial court's decision to deny a motion for a directed verdict, an appellate court must take the strongest legitimate view of the evidence in favor of the non-moving party, construing all evidence in that party's favor and disregarding all countervailing evidence. A motion for a directed verdict should not be granted unless reasonable minds could reach only one conclusion from the evidence. The standard of review applicable to a motion for a directed verdict does not permit an appellate court to weigh the evidence. Moreover, in reviewing the trial court's denial of a motion for a directed verdict, an appellate court must not evaluate the credibility of witnesses. Accordingly, if material evidence is in dispute or doubt exists as to the conclusions to be drawn from that evidence, the motion must be denied.

Johnson v. Tennessee Farmers Mut. Ins. Co., 205 S.W.3d 365, 370 (Tenn. 2006) (internal citations omitted).

Parent and subsidiary corporations "are generally presumed to be separate and thus parent corporations are not liable for the acts of their subsidiaries." *Loew v. Gulf Coast Dev., Inc.*, 1991 WL 220576 at *3 (Tenn. Ct. App. Nov. 1, 1991). However, direct liability can be imputed to a parent entity as a result of the parent's control over a subsidiary. *U.S. v. Bestfoods*, 524 U.S. 51, 65 (1998). A duty of care can also be imposed on a corporate defendant for the acts of an agent, subsidiary or related entity through the application of the instrumentality rule, which allows "a court to disregard the separate entity of a subsidiary corporation and fix its liability on the parent corporation." See *Elec. Power Bd. v. St. Joseph Valley Structural Steel Corp.*, 691 S.W.2d 522, 526 (Tenn. 1985). In order to apply the instrumentality rule, the Tennessee Supreme Court noted that

It is not necessary for one to show that he has been misled, deceived or actually defrauded, to enable him to invoke this rule. It is enough that the parent corporation's domination of the subsidiary was so complete as to make them practically indistinguishable or to make the subsidiary a mere tool, agency or instrumentality of the parent; and that he will suffer loss unless the parent be held.

Cont'l Bankers Life Ins. Co. of the South v. Bank of Alamo, 578 S.W.2d 625, 633 (Tenn. 1979) (citing *Tenn. Consol. Coal Co. v. Home Ice & Coal Co.*, 156 S.W.2d 454, 458 (Tenn. Ct. App. 1941)); accord *Stigall v. Wickes Mach.*, 801 S.W.2d 507, 510 (Tenn. 1990). The "determination of whether or not a corporation is a mere instrumentality of an individual or a parent corporation is ordinarily a question of fact for the jury." *Elec. Power Bd.*, 691 S.W.2d at 526.

Another theory of liability that can impose a duty of care on a corporate entity is the doctrine of respondeat superior. This doctrine holds that an employer may be held vicariously liable for the acts of its employee done within the scope of its employment. *White v. Revco Discount Drug Centers, Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000); *Tennessee Farmers Mut. v. American Mut.*, 840 S.W.2d 933, 937 (Tenn. Ct. App. 1992). "To hold the master/principal vicariously liable, 'it is enough that the servant or agent was acting in the business of his superior.'" *Johnson v. LeBonheur Children's Medical Center*, 74 S.W.3d 338, 343 (Tenn. 2002) (quoting *Kinnard v. Rock City Const. Co.*, 286 S.W.2d 352, 354 (Tenn. Ct. App. 1955)).

However, an employer may defend against vicarious liability pursuant to the loaned servant doctrine, which provides that, if an employee of one employer falls under the scope of a second employer, the liability for the employee's negligence may shift to the second employer. *Arrow Elec. v. Adecco Employment Serv., Inc.*, 195 S.W.3d 646, 651 (Tenn. Ct. App. 2005); *Parker v. Vanderbilt Univ.*, 767 S.W.2d 412, 416 (Tenn. Ct. App. 1988). For an employer "to escape responsibility for the negligence of his servant on the theory that the servant has been loaned, *the original master must resign full control of the servant for the time being*. It is not sufficient that the servant is partially under control of a third person." *Chamberlain v. Lee*, 257 S.W. 415, 417 (Tenn. 1923) (emphasis added); accord *Price v. McNabb & Wadsworth Trucking Co.*, 548 S.W.2d 316, 318 (Tenn. Ct. App. 1977). To determine whether an employee has shifted under the scope of another employer, the Tennessee Supreme Court asked the question, "In whose work was the employee engaged at the time?" *Gaston v. Sharpe*, 168 S.W.2d 784 (Tenn. 1943); *Price*, 548 S.W.2d at 318.

Both testimonial and documentary evidence support the lower court's denial of NHC's and National's motion for direct verdict on the issue of liability. The testimony of the Facility's administrators and staff demonstrate those defendants' control over the Facility. Andy Adams, the president of NHC and National, testified that he had the authority to make changes at the Facility to correct problems that arose. NHC would receive a monthly "management fee" from the Facility, which was directly proportional to the revenue generated by the Facility; Mr. Adams acknowledged that no written agreement was entered into to create this arrangement since NHC and NHC/McMinnville were related entities. Mr. Wrather, the Facility's administrator, testified that after the Facility's budget was calculated, it would be sent to NHC's home office to be signed, and that

the home office had the power to revise the figures. Ms. Wilson, the former director of nursing at the Facility, testified that the training programs for the Facility's CNAs were held at the Facility, but were conducted by NHC. The Facility's former and current staff members testified that (1) NHC provided training to the Facility's employees; (2) NHC regulated certain aspects of employment at the Facility⁶; (3) the employee's ID tags bore the NHC logo; and (4) that they considered themselves employees of NHC.

Furthermore, NHC's Administrative Procedures Manual outlines the role its employees have in the operation of the Facility. The Manual states that "Regional Vice Presidents have been delegated the authority, responsibility, and accountability to oversee the operations of a designated number of health care centers (such as the Facility) within their respective regions." The manual also states that each facility's, or center's, "administrator reports direct to [NHC's] Regional Vice President." Mr. Adams testified that these Regional Vice Presidents have the authority to hire and fire the facility administrators within their jurisdiction.

On January 1, 1998, NHC and National entered into a Service Agreement ("Service Agreement") which stated that "NHC desires to obtain access to the services of employees of National and National desires to provide the services of such employees to NHC for the purpose of assisting NHC to carry out its business purposes." The only signatory to the Service Agreement was Andrew Adams, who signed on behalf of NHC in his capacity as NHC's President and also signed on behalf of National in his capacity as National's President. NHC/McMinnville was not a party to the Service Agreement.

The Service Agreement includes various clauses which pertain to the management and control of the Facility's employees. Under a clause titled "National's Responsibilities as Regards to Employees," National had the authority and responsibility:

A. To employ those persons necessary to provide services to the business of NHC...and *as their employer* to set all wages and salaries, provide all fringe benefits, and *otherwise perform all duties customary, necessary and appropriate to their employer.*

(emphasis added). Mr. Adams testified that the Service Agreement was the controlling document over the utilization of National's employees "for purposes of carrying out [NHC]'s business."

Another relevant provision of the Service Agreement, titled "Direction and Control - Employees," states that:

NHC and National agree that National as employer has the right to exercise direction and control relating to the management of safety, risk and labor matters at work site locations. However, National shall consult with NHC, and NHC shall have the

⁶ NHC set restrictions regarding a Facility employee's dress, jewelry, etc.

opportunity to consult with National on the following issues...to (i) hire, fire, discipline and direct and regulate and supervise all working conditions and labor policies; (ii) establish all wages, benefits, salaries, bonuses or advancements; (iii) conduct safety inspections of NHC's equipment and work site; and set and administer employment and safety policies; and (iv) facilitate collective bargaining relationships between National and labor unions representing the employees described hereunder and contract administration in connection therewith.

National shall be entitled...to install inconspicuous location(s) bulletin board(s) at NHC's work site(s), in order to effectively communicate with the employees.

Mr. Adams testified that National was responsible for ensuring that the Facility's employees were paying the FICA withholdings and for making contributions to their pension plan.

Lastly, prior to ruling on NHC's and National's motion for directed verdict on the issue of punitive damages, the trial court reiterated that:

NHC Healthcare, NHC Health, and NHC/McMinnville were engaged in the same type of goal: They were providing healthcare; they were engaged in seeing that NHC/McMinnville provided healthcare in a nursing home facility. That is the reason that they are still in this case. There is evidence that they engaged in some type of negligent behavior in failing to see that the facility was properly staffed, possibly, that the care given was appropriate, possibly. That was part of their business...They, you know, try to say that they don't -- are not involved, they're stand-off, they didn't have anything to do with it. That's not particularly true; they did. Healthcare was their business. That's what they did, that's why they're still in the case.

NHC and National argue that they have no direct liability to Mr. Myers. Upon review of the above evidence and trial court's findings, we find that the trial court did not err in allowing this question to go to the jury. Sufficient doubts existed as to the conclusions to be drawn from the evidence regarding a direct duty of care and reasonable minds could reach more than one conclusion. As such, the trial court's denial of NHC's and National's motion for directed verdict was proper.

NHC and National also assert that the Facility's staff were loaned servants, thus liability for their acts shifted to the Facility. By raising the loaned servant defense, NHC and National implicitly concede that they are vicariously liable for the acts of the Facility's employees done within the scope of employment inasmuch as the doctrine of loaned servant requires vicarious liability to exist in the party invoking the defense before it can be shifted to a second employer. *See Parker*, 767 S.W.2d at 416. As such, the question that NHC and National pose is whether liability had shifted from them to the Facility under this doctrine. Based on the evidence and trial court's findings, we find that reasonable minds could differ on the question of whether the Facility's staff were loaned servants and, consequently, that the trial court's denial of NHC's and National's motion for directed verdict was proper.

B. Joinder of Negligence and Medical Malpractice Claims

The defendants allege that the trial court erred in not granting its motion for directed verdict on the negligence cause of action, asserting that all the conduct alleged in the complaint falls entirely within the Tennessee Medical Malpractice Act (“MMA”).⁷ We find that the trial court properly denied the directed verdict motion on the negligence claim.

The difficulty in distinguishing between claims for negligence and medical malpractice is that “medical malpractice is but a species of negligence and ‘no rigid analytical line separates the two.’” *Gunter v. Laboratory Corp. of America*, 121 S.W.3d 636, 639 (Tenn. 2003) (citing *Weiner v. Lenox Hill Hosp.*, 673 N.E.2d 914, 916 (N.Y. 1996)); *accord Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn. 2005). The Tennessee Supreme Court provided the following analysis of the issue:

...when a claim alleges negligent conduct which constitutes or bears a substantial relationship to the rendition of medical treatment by a medical profession, the medical malpractice statute is applicable. Conversely, when the conduct alleged is not substantially related to the rendition of medical treatment by a medical profession, the medical malpractice statute does not apply.

Gunter, 121 S.W.3d at 641; *accord Draper*, 181 S.W.3d at 291. A medical malpractice claim is not triggered simply because a party to an action is a health or medical entity. *Gunter*, 121 S.W.3d at 640; *accord Draper*, 181 S.W.3d at 290-91.

To determine which cause of action arose from an individual’s conduct, the expertise used in performing the alleged negligent act must be categorized. *Conley v. Life Care Centers of America, Inc.*, 236 S.W.3d 713, 729 (Tenn. Ct. App. 2007). Where a complaint alleges negligence in regard to “acts or omissions involving medical science and expertise, they fall within the scope of the MMA.” *Id.*; *Peete v. Shelby County Health Care Corp.*, 938 S.W.2d 693, 696 (Tenn. Ct. App. 1997). If no such training is necessary, then the claim falls within ordinary negligence. *Conley*, 236 S.W.3d at 729; *Peete*, 938 S.W.2d at 696.

The fact that the defendants are medical entities will not make their conduct solely medical malpractice, *Gunter*, 121 S.W.3d at 640, nor does the fact that Mr. Myers received care from “certified nursing assistants” make the care “substantially related to the rendition of medical treatment.” See *Todd v. Weakley County*, 1998 WL 395172 at *5 (Tenn. Ct. App. July 16, 1998) (holding that “nurse’s aides are not health care practitioners because they are not licensed to practice professional nursing pursuant to Title 63 [Tenn. Code Ann.] and because their job is to perform unspecialized services for which a licensed practitioner is not needed.”) Each service must be categorized as either ordinary or medically-related depending upon, among other things, the medical expertise or knowledge actually used, and not just upon the expertise or knowledge simply possessed, by the person performing the services. *Conley*, 236 S.W.3d at 729.

⁷ Tenn. Code Ann. § 29-26-115, et. seq.

Andy Adams testified at trial that some of the care provided to residents was referred to as “skilled nursing services” which call for “appropriately trained nurses to exercise their professional judgment in connection with their care and treatment of their patients.” Mr. Adams further testified that other care was referred to as “custodial services” or “activities of daily living” services which included feeding, hydrating, cleaning, and grooming; he stated that these services “[do not] require skilled nursing personnel” and thus are performed by “nonlicensed personnel.”

While a resident at the Facility, Mr. Myers received a significant amount of care. Some of this care included the “custodial services” such as bathing, feeding, grooming, etc.; functions that the plaintiffs could have provided themselves. The other care Mr. Myers received included the “skilled nursing services” aimed at diagnosing, treating, and preventing injuries and illnesses, such as the contractures, pressure sores, urinary tract infections and hip fracture; functions which require a degree of medical expertise. The trial court, in its August 17, 2007 order (“August 17 order”) denying the defendants’ motion for a new trial, acknowledged this case as “being a hybrid of medical malpractice and general negligence claims” and found that “there was sufficient factual basis for both causes of action to proceed.”

Upon review of the evidence in the light most favorable to the plaintiffs, we find that reasonable minds could differ as to whether an action for negligence existed. Mr. Adams confirmed that certain acts of the defendants could be classified as medical malpractice and certain acts could be classified as negligence. There is a distinction between acts constituting ordinary negligence and those constituting medical malpractice; the trial court was correct in submitting both causes of action to the jury for its consideration and the jury was properly instructed on each.⁸ The trial court

⁸ During the jury charge, the trial court prefaced its instruction on each claim with the following caveat:

There is more than one claim in this lawsuit. You will decide each claim separately. Each claim is entitled to a fair and separate consideration. Unless you are instructed to the contrary, the instructions apply to the facts of each claim.

The trial court then instructed the jury on the distinction between the standard the defendants were to be held to under each claim. On the medical malpractice action, the trial court stated that:

A nursing home must furnish with care, attention and protection reasonably required by the patient’s known mental and physical condition. The amount of caution, attention and protection required is that generally used by nursing homes in the same or similar community and required by its express or implied contract with the patient.

On the ordinary negligence action, the trial court stated that:

...fault has two parts: negligence and legal cause. Negligence is the failure to use ordinary or reasonable care. It is either doing something that a reasonably careful person would not do, or the failure to do something that a reasonably careful person would do, under the circumstances similar to those shown in the evidence.

correctly denied the directed verdict motion as material evidence on whether the defendants were liable for negligent acts and acts of medical malpractice was in dispute and there was doubt as to whether reasonable minds would reach one conclusion from the evidence.

C. Evidentiary and Argument Issues

The defendants assert that the jury's compensatory damage award was excessive because of alleged improper evidence introduced and arguments made at trial which prejudiced the jury. These assertions will be addressed below.

1. Evidence Regarding Mr. Adams' Stock Holdings and the Number of Affiliated Entities

The defendants assert that plaintiffs' counsel's argument relating to and evidence of Mr. Adams' stock holdings, as well as the evidence regarding the number of the affiliated entities, should have been excluded as irrelevant and unfairly prejudicial because the plaintiffs allegedly introduced such evidence and argument only to show that the defendants had the ability to pay a large award. The plaintiffs argue that the stock holdings were used to show Mr. Adams' bias and that testimony about the affiliated entities was introduced to show the number of facilities under defendants' control, which included the facility at issue in the case.

Specifically, in the course of plaintiffs' counsel's opening argument, the following statement was made regarding Mr. Adams' stock holdings:

And you're going to hear from...Andy Adams, he's going to be a key witness in this case, and *you're going to have to judge his credibility* and decide what he's got to say and whether you think it's accurate or not.

And one of the things you're going to have to consider is whether he's got a stake in the outcome of this case.

And we believe...that the proof will show that Mr. Andy Adams and this company advertised and placed to their employees an emphasis on returning a profit to their shareholders. You'll see the company holds foremost the objective to return a reasonable profit to our shareholders.

...the proof's going to show the biggest shareholder was Andy Adams, and the gross value of his interest in that company is 50- (sic) to \$60 million.

(Emphasis added.)

Also, during the defendants' objection to the plaintiffs' continued questioning on the size of the affiliated entities, plaintiffs' counsel and the trial court had the following colloquy:

MR. CONNER: ...certainly, evidence, which may not be admissible for certain reasons, may be admissible for other reasons.

We're not offering this for size and scope and magnitude as it relates to punitive damages. We're offering this to show that NHC has this umbrella of 74 facilities that it operates, manages, and is in control of, which includes the NHC/McMinnville facility.

THE COURT: I can't see how this hurts...I'm going to allow it. My point was...I don't want it to get into punitive damages...it does have some relevance as to -- possibly as to control of what they do. I just don't -- that's not going to be prejudicial. I can't imagine that.

The standard for reviewing a trial court's evidentiary decisions was set forth by this Court in *White v. Vanderbilt Univ.*, 21 S.W.3d 215 (Tenn. Ct. App. 1999) as follows:

The admission or exclusion of evidence is within the trial court's discretion. *See Seffernick v. Saint Thomas Hosp.*, 969 S.W.2d 391, 393 (Tenn. 1998); *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992). The discretionary nature of the decision does not shield it completely from appellate review but does result in subjecting it to less rigorous appellate scrutiny. *See Tennessee Dep't of Health v. Frisbee*, No. 01A01-9511-CH-00540, 1998 WL 4718, at *2 (Tenn. Ct. App. Jan. 9, 1998) (No Tenn. R. App. P. 11 application filed); *BIF v. Service Constr. Co.*, No. 87-136-II, 1988 WL 72409, at *2 (Tenn. Ct. App. July 13, 1988) (No Tenn. R. App. P. 11 application filed). Because, by their very nature, discretionary decisions involve a choice among acceptable alternatives, reviewing courts will not second-guess a trial court's exercise of its discretion simply because the trial court chose an alternative that the appellate courts would not have chosen. *See Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999).

Discretionary decisions require conscientious judgment. *See BIF v. Service Constr. Co.*, 1988 WL 72409, at *2. They must take the applicable law into account and must also be consistent with the facts before the court. *See Overstreet v. Shoney's, Inc.*, 4 S.W.3d at 709. Appellate courts will set aside a discretionary decision only when the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight of the evidence. *See Overstreet v. Shoney's, Inc.*, 4 S.W.3d at 709. Thus, a trial court's discretionary decision should be reviewed to determine: (1) whether the factual basis for the decision is supported by the evidence, (2) whether the trial court identified and applied the applicable legal principles, and (3) whether the trial court's decision is within the range of acceptable alternatives. *See BIF v. Service Constr. Co.*, 1988 WL 72409, at *3. Appellate courts should permit a discretionary decision to stand if

reasonable judicial minds can differ concerning its soundness. *See Overstreet v. Shoney's, Inc.*, 4 S.W.3d at 709.

White v. Vanderbilt Univ., 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999).

A claim for negligence requires, among other things, the presence of “a duty of care owed by the defendant to the plaintiff.” *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). This duty of care can be imposed upon a parent corporation through the instrumentality rule by proving the parent’s sufficient control over the subsidiary. *Elec. Power Bd.*, 691 S.W.2d at 526; *Cont’l Bankers Life Ins. Co. of the South*, 578 S.W.2d at 633. Thus, evidence of the defendants’ control over the Facility was relevant to the plaintiffs’ burden of proving an element of negligence.

Tennessee Rule of Evidence 616, titled “Impeachment by Bias or Prejudice,” allows a party to “offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness.” Tenn. R. Evid. 616. Mr. Adams’ stock holdings were evidence of the financial interest he held in the success of the defendants and, pursuant to Rule 616, the plaintiffs’ were permitted to impeach his credibility through the presentation of such evidence to demonstrate his bias.

The trial court’s August 17 order denying the defendants’ motion for a new trial stated that “[a] witness’s pecuniary interest in the outcome of a case is highly relevant...and (the court) found the testimony regarding Mr. Adams’ stock holdings and the size of the affiliated entities to be very probative and not outweighed by the danger of unfair prejudice to the Defendants.” The trial court held that “there were...other valid reasons for this line of questioning” and that the evidence was not admitted by the plaintiffs for an “improper purpose.” We agree that valid, relevant reasons existed to support the admission of the evidence pertaining to Mr. Adams’ stock holdings and to the size of the affiliated entities and find that the trial court did not abuse its discretion in admitting this testimony.⁹

2. Evidence Regarding Certification, In-Service Training, and Performance Evaluations of the Facility’s Employees

The defendants assert that evidence regarding the certification, in-service training, and performance evaluations of the Facility’s employees should have been excluded as irrelevant and unfairly prejudicial because these issues had no direct bearing on the care provided to Mr. Myers and were introduced solely to inflame the jury. The plaintiffs argue that this evidence showed the understaffing problems at the Facility and the resulting need to rely on unsupervised, untrained, uncertified CNAs to provide care to the residents.

⁹ As further evidence that the plaintiffs were not offering the size of the affiliated entities for an improper purpose, plaintiffs’ counsel later told the trial court that they were “perfectly willing to forebear [this line of questioning], if [the defendants] admit they operate, manage and control NHC/McMinnville.”

Part of the relief sought by the plaintiffs was compensatory damages for the claim filed under the MMA and punitive damages. The plaintiffs assert that evidence of the CNAs' certification, training and performance evaluations was used to show the short staffing situation at the Facility. The plaintiffs argue that the short staffing problem was presented for two purposes: (1) to prove that the defendants "failed to act with ordinary and reasonable care" in accordance with the standard of care required for a claim under the MMA,¹⁰ and (2) to prove that the defendants' actions rose to the level of recklessness to warrant liability for punitive damages.¹¹

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403. The trial court's August 17 order stated that "[e]vidence of the certification, in-training, and performance evaluation of facility employees was relevant as to whether there was adequate staffing at the facility and to the training provided to employees by the entities." We find that the trial court did not abuse its discretion in concluding that evidence of the CNAs' certification, training and performance evaluations was relevant to the plaintiffs' burden of proving the MMA claim and to the request for punitive damages.

3. Evidence Regarding the Federal and State Regulatory Standards on Staffing Requirements to Meet the Needs of Residents

The defendants argue that the plaintiffs' reliance throughout the trial on the federal regulatory standards regarding nursing home staffing requirements was improper because those standards were "too vague and general to be enforceable as standards" and that the same "would constitute a

¹⁰ A claim filed under the MMA places upon the plaintiff the burden of proving:

(1) The recognized standard of acceptable professional practice in the profession and the speciality thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;

(2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard...

T.C.A. § 29-26-115(a).

¹¹ A request for punitive damages requires that the plaintiff first prove that "[the record] contains material evidence that supports a finding by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly." *Flax v. DaimlerChrysler Corp.*, 2008 WL 2831225 at *30 (Tenn. July 24, 2008). Recklessness is defined as when a "person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." *Cf.* Tenn. Code. Ann. § 39-11-302(c) (1991) (criminal definition of "reckless"); *see Hodges*, 833 S.W.2d at 901.

national standard of care in abrogation” of the MMA’s “locality rule.” The defendants also assert that their expert was improperly prevented from discussing the Tennessee regulatory standards on nursing home staffing requirements to rebut the plaintiffs’ use of the federal standards. The plaintiffs argue that they did not rely solely on the federal regulatory standards, but that their expert relied on some factors from the federal scheme in forming his opinion as to the community standard of care. The plaintiffs also assert that defendants’ expert was able to testify regarding the staffing standards he relied upon, and was only prevented from referring to those standards as the Tennessee regulatory standards. We find that each party’s expert was properly permitted to testify regarding the standard of care on staffing requirements based on the factors the expert deemed relevant and there was no error in the admission of such evidence.

a. Federal Staffing Standards

Under section (a)(1) of the MMA, known as the “locality rule,” “a party proffering expert testimony regarding the applicable standard of care must demonstrate that the expert has knowledge of the standard of care applicable in the defendant’s community or in a community that the party demonstrates is similar to that of the defendant.” *Allen v. Methodist Healthcare Memphis Hosps.*, 237 S.W.3d 293, 295 (Tenn. Ct. App. 2007). “[T]he expert must present facts demonstrating how he or she has obtained knowledge of the standard of care in either the community in which the defendant practices or in a similar community.” *Id.* at 296.

The defendants’ assertions that the federal standard of care was “too vague” and in violation of the “locality rule” are based on this Court’s decision in *Conley v. Life Care Centers of America, Inc.*, 26 S.W.3d 713 (Tenn. Ct. App. 2007). In that case, the plaintiff “asserted negligence per se claims against Life Care based upon alleged violations of federal regulations” and “contended [that] Life Care was required to maintain the nursing home in compliance with the minimum statutory standards and failing to do so constituted negligence per se.” *Conley*, 26 S.W.3d at 732-33. This Court held that “federal regulations are simply too vague and general to constitute a standard of care by which a jury, or for that matter a court, can effectively judge the acts or omissions of health care providers and nursing home operators.” *Id.* at 733. Furthermore, this Court stated that the MMA’s “statutory scheme does not permit a plaintiff in a medical malpractice action to rely on a so-called national standard of care to establish a violation of acceptable professional practices in a medical community in Tennessee.” *Id.* at 734. The Tennessee Supreme Court in *Robinson v. LeCorps*, 83 S.W.3d 718 (Tenn. 2002) stated that it is “mindful...that in many instances the national standard would indeed be representative of the local standard...” *Robinson*, 83 S.W.3d at 724. The Court held that “[w]hile an expert’s discussion of the applicability of a national standard does not require exclusion of the testimony, such evidence may not substitute for evidence that first establishes the requirements of [the MMA].” *Id.*

Prior to the testimony of both the plaintiffs’ and defendants’ experts, the trial court ruled on the defendants’ motion to exclude references of the federal regulations on nursing home staffing requirements:

THE COURT: ...The federal regulations, in and of themselves, are not the, quote, standard of care.

THE COURT: ...[The federal regulations] can be used in your overall scheme of establishing the standard of care, but if you're just left with that, if you're just left with a witness who says the federal regulations are X, Y, and Z, and they didn't do it, therefore, they were below the standard of care, I've got a problem with that.

THE COURT: My ruling is, I'm going to have to hear what the expert says, and if they incorporate part of the federal regulations into [their testimony]...it's certainly conceivable to me that ...what is contained in part of the federal regulations could be used as part of the basis for establishing standard of care.

The trial court later addressed *Conley*'s application to this case during an objection to the testimony of the plaintiffs' expert witness, Dr. James Sexson. The trial court stated that:

although the *Conley* case seems to indicate that you can't say the federal regulations are the standard of care, I think it's fair based on all of the evidence in this case, and the law that I can find, to ask someone what is the standard of care. And if it happens to be...somewhat vague, but if that's what they're saying the standard of care is, then that's what they say it is.

The trial court stated that "the terminology and the state regulations and the federal regulations themselves, based on [*Conley*], are not the standard of care. However, components of the state and federal regulations independently may be used by an expert in determining the standard of care in the State of Tennessee." The court went on to say that an expert's opinion regarding the appropriate standard of care is not disregarded simply because it includes federal statutory standards.¹²

We find that the trial court did not err in allowing the jury to hear evidence of the federal standard of care. Unlike the situation in *Conley*, the plaintiffs here were not asserting a claim for negligence *per se*, nor were they relying solely on the federal standard of care to establish the community standard of care. Rather, the plaintiffs' expert testified as to the factors he considered when forming his opinion regarding the community standard of care, and, pursuant to the decision in *Robinson*, this testimony is not inadmissible simply because some of those factors included federal standards.

¹² The trial court's August 17 order stated that "[t]he court feels strongly that regulatory standards - federal or state - are not admissible to show negligence *per se*. However, it is impossible to exclude regulations when they are relied upon by an expert in determining the standard of care in a negligence or medical malpractice action."

b. State Staffing Standards

The defendants also assert that evidence offered by them of the Tennessee regulatory staffing standards was excluded. They do not claim that the Tennessee regulatory standards are the applicable standard of care, but contend that they should have been permitted to introduce the state standards to rebut the plaintiffs' use of the federal standards in order to provide the jury with all standards when determining what the standard of care should be.

In response to a motion made by the plaintiffs during the trial regarding the defendants' introduction of the Tennessee regulatory standards on nursing home staffing requirements, the trial court stated the following:

THE COURT: ...I think stating what the minimum is not, in and of itself, the standard of care simply because it's a regulation of the state of Tennessee, just as the federal regulations, in and of themselves, are not the standard of care.

However, [the regulations'] numbers that are required may be considered the standard of care through someone else. So if your witness comes in and says, yes, the standard of care is that you shall not fall below 2 or 2.1, whatever, patients per nurse, whatever it is, then that's fine, even if it's the same as the state regulations, but I think to throw that out there and say that the state required this, and this is what we did, would unfairly lead the jury, in my opinion, to believe that that is the standard of care, in and of itself, simply because it's a state regulation.

Prior to the testimony of the defendants' expert, Dr. James Powers, the trial court reiterated this ruling regarding testimony on the standard of care by stating the following:

THE COURT: ...whatever [the expert] wants to say the standard of care is is fine, but he can't couch it in terms of, The standard of care is in the regs (sic) which is this.

If he wants to say that standard of care in Tennessee is that you need to be staffed somewhere between 2.0 and 3.5, and that's just it, then that's fine, but he can't reference the state minimums.

During the direct examination of the defendants' expert, the defendants' counsel posed the following line of questioning:

Q. Now, are you familiar with the level of staffing in nursing homes in Tennessee?

A. I am.

Q. And are you familiar with the level of staffing in nursing homes in communities like we have here in McMinnville, Tennessee?

A. Yes, indeed.

Q. What is the staffing level generally utilized at nursing homes in this community or similar communities?

A. In cases that I've been involved in, in facilities that I...had my patients in, generally the staffing is somewhere around 2.5 hours per patient, to 3. That is the general rule, in my experience.

As shown by the above excerpt, the defendants were not prevented from introducing evidence of the Tennessee regulatory standards on staffing requirements to the jury; their expert was permitted to testify to such, and was only prevented from mentioning that such standards derive from the Tennessee regulations. Contrary to the defendants' assertion, their expert was permitted to introduce evidence on the state staffing standards to the jury, and we do not find that the trial court abused its discretion in limiting such testimony by preventing the classification of the expert's standards as the Tennessee regulatory standards.

4. Evidence Regarding the Destruction of Activities of Daily Living Records

The defendants assert that evidence regarding the destruction of Activities of Daily Living ("ADL") records should have been excluded because the destruction of such documents was done in accordance with the Facility's record retention policy and applicable law and because the plaintiffs introduced the evidence only to suggest that the defendants' actions were improper. The plaintiffs argue that the trial court was correct to allow the jury to hear of the defendants' acts of spoliation because the ADL records were relevant to the plaintiffs' claim and the defendants continued to shred them prior to discovery even after the plaintiffs' made a pre-discovery request for their production.

In order to prove the defendants' spoliation of the ADL records and the improper purpose behind their actions, plaintiffs' counsel questioned Ms. Wilson, the Facility's former director of nursing, regarding the request for and destruction of documents:

Q: Ma'am, you are aware, are you not, that on March 10 of 2005, your facility received a letter from our firm requesting the production of certain medical records, correct?

A: I'm aware of it now that I see it, yes.

Q. And [the letter] says, please forward a black and white copy of the complete medical record for Cheatum L. Myers to the above address within ten days...

A. Yes.

Q. Now, flow sheets regarding turning and repositioning were in existence at the time that would have been received, weren't they?

A. Yes.

Q. And they would have been continued to be generated in connection with Mr. Myers' care and treatment every day after this letter as received, until he was discharged, wouldn't they?

A. Yes.

Q. And notwithstanding that request, your facility went ahead and shredded those records, didn't it?

A. Yes.

Q. And so with them shredded, there's no way for them to be available to us, is it?

A. No.

Q. And you can't tell and we can't tell whether he was turned or repositioned on any day at a given time in that facility, or what side he was on, can we?

A. No.

Q. ...in this case, while [the flow sheets are] still in existence, and while the patient's asking for them, you said, well, we're just going to go ahead and destroy them anyway, right?

A. No, sir. To be honest with you, I don't consider [the flow sheets] part of the medical record.

Q. But he asked for them, didn't he? And he's entitled to them, isn't he?

A. Yeah, he's entitled for what's his information, yes.

On cross examination, defendants' counsel questioned Ms. Wilson regarding the Facility's record retention policy:

Q. You were also asked yesterday about...an ADL tracking form...

A. Yes.

Q. Were those documents ever intended to be part of the patient's medical chart?

A. No, sir.

Q. Now, as far as these documents..., where were they maintained? I think you said they were kept for a certain period of time; is that right?

A. Yes.

Q. And then what happened after that certain period of time?

A. They were discarded.

Q. Actually shredded; is that right?

A. Yes, yes.

Q. And is that to preserve patient's privacy?

A. Yes, possibly.

The trial court instructed the jury regarding spoliation of evidence as follows:

If you determine by a preponderance of the evidence that any of the defendants intentionally, and in circumstances indicating fraud and a desire to suppress the truth, destroyed, mutilated, lost, altered or concealed records relevant to the plaintiff's (sic) claims, then the jury may infer that such destroyed, mutilated,

lost, altered or concealed records would be unfavorable to the responsible defendants. Such an inference does not arise when the destruction was a matter of routine and where there was no fraudulent intent.

“The doctrine of spoliation of evidence permits a court to draw a negative inference against a party that has intentionally, and for an improper purpose, destroyed, mutilated, lost, altered, or concealed evidence.” *Bronson v. Umphries*, 138 S.W.3d 844, 854 (Tenn. Ct. App. 2003). “This inference is rebuttable and arises only when the spoliation occurs in circumstances indicating fraud and a desire to suppress the truth. It does not arise when the destruction was a matter of routine with no fraudulent intent.” *McLean v. Bourget’s Bike Works, Inc.*, 2005 WL 2493479, * 4 (Tenn. Ct. App. Oct. 7, 2005).

The plaintiffs alleged that the defendants’ destruction of the ADL records was done with an improper purpose, and the defendants were afforded the opportunity to rebut that allegation by proving that a valid purpose existed for the destruction of the documents and that it was a routine procedure at the Facility. The trial court’s charge instructing the jury as to the inferences it could draw from the evidence correctly framed the doctrine of spoliation in accordance with this Court’s decision in *McLean*. As such, the trial court did not err in admitting evidence of spoliation of records.

5. Testimony of the Facility’s Professional Staff

The defendants assert that Lori Womack and Melinda Wilson, members of the professional staff at the Facility, should have been prohibited from providing what defendants contend are expert opinions because they were fact witnesses and that they should not have been compelled to provide such opinions because they are experts “only by nature of their chosen field.” The trial court’s August 17 order stated that:

[n]urses are competent to testify in their areas of expertise and this court is of the opinion that the testimony of [the CNAs] did not relate to the standard of care for the facility. Witnesses of this type may testify as to their actions as well as what could and could not be done based on staffing in the facility, and the testimony of these witnesses did not exceed these bounds.

In accordance with Tenn. R. Evid. 701, the fact that a witness is not qualified as an expert witness does not prevent that witness from rendering an opinion, so long as the court determines that the testimony is based on the perception of the witness and is helpful to an understanding of the testimony or the determination of the facts at issue. This court has reviewed the testimony of Ms. Womack, the physical therapist for the Facility, and Ms. Wilson, the former director of nursing, which defendants contend should not have been admitted, and find that the trial court did not err in admitting such testimony. To the extent that the witnesses’ testimony included opinions, each

witness testified based on their experience at the Facility, within the areas of their responsibility and as to the ways that patient care was provided at the Facility.¹³

6. Plaintiffs' "Profits over People" Argument

The defendants assert that the "profits over people" argument mentioned in plaintiffs' opening and closing arguments should have been excluded as improper and inflammatory because plaintiffs' only alleged purpose for using this language was to inflame the jury. The plaintiffs assert that this argument was properly permitted because it was supported by evidence introduced at trial.

¹³ For instance, Ms. Womack gave the following testimony:

Q. Ms. Womack, as a physical therapist, if a resident had an order for non-weightbearing, you would not want them up putting weight on that leg, would you?

A. No.

Q. ...Would it be important that a CNA transferring a resident by themselves know that that resident had an order for non-weightbearing?

A. Yes.

Similarly, Ms. Wilson, testified:

Q. Now, likewise, the rule – the policies and procedures that you generated, or that were generated for that facility, the policies and procedures covered virtually every aspect, also, didn't they?

A. Yes, sir.

Q. And you understood, did you not, that the policies and procedures had to conform to the requirements and the rules and regulations?

A. I understood that the policies and procedures are guidelines. Standards of care is what a prudent nurse would do in a given situation.

Q. You understand what the standard of care is, right?

A. Standard of care is what a prudent nurse in the situation would do.

Q. And that's part of what you did in your in-service training was you taught people what the standard of care was in a given situation, right?

A. Yes.

Q. That was part of your job, wasn't it?

A. Right. Yes.

Q. You understood that the standard of care in this community required that care for residents be conducted and promoted in a manner that enhanced and maintained their dignity and respect? That's basically the standard of care, isn't it?

A. I understand as a nursing professional and as a caregiver that it is prudent for you to treat people with dignity and respect. Now, whether that is a standard of care in black and white in the federal, state or community regulations, I don't know that it is.

A. But I can't answer for every nursing professional in this community. I'm answering from a personal professional level.

During opening statements, plaintiffs' counsel stated that they "believed that the proof will show that NHC...placed such an emphasis on profits that they valued it over people." In their closing argument, plaintiffs' counsel stated that "[t]he supervisory personnel...at [National]...at [NHC] cast a blind eye and a deaf ear to what was going on in that facility, because they were in pursuit of profits. They put revenue ahead of residents. They put profits over people." During the course of the trial, the plaintiffs introduced comparative income statements showing that, during Mr. Myers' residency, the defendants reduced the number of staff members at the Facility while increasing the number of residents admitted, leading to an increase in revenue and a decrease in the staffing levels.

"In general, the control over the argument of counsel resides with the trial court, and the trial court has broad discretion as to what shall and shall not be permitted in argument." *Davis v. Hall*, 920 S.W.2d 213, 217 (Tenn. Ct. App. 1995). In reviewing a trial court's action, this Court stated that it:

generally will not interfere with the discretionary action of a trial court in refusing to grant a mistrial or a new trial for misconduct of counsel in argument unless the argument is clearly unwarranted and made purely the purpose of appealing to passion, prejudices and sentiment which cannot be removed by sustained the objection of opposing counsel.

Id. (citing *Perkins v. Sadler*, 826 S.W.2d 439, 442 (Tenn. Ct. App. 1991)).

The trial court properly instructed the jury that "any questions, objections, statements, or arguments made by the attorneys during the trial are not evidence." The argument of counsel for plaintiffs was supported by proof of an increase in revenue and a decrease in staffing levels. Allowing the argument was not error.

7. Plaintiffs' Argument to "Send a Message" to the Defendants

The defendants assert that the plaintiffs should not have been permitted to tell the jury to "send a message" to the defendants during the liability phase of the bifurcated trial because this encouraged the jury to punish the defendants through the award of compensatory damages. The plaintiffs argue that they only asked the jury to "send a message" to the defendants by finding them liable for punitive damages, not to send a message through its award of compensatory damages.

In the closing argument, plaintiffs' counsel stated:

And, finally, ladies and gentlemen, you're going to be asked to determine whether or not, under the circumstances of this case...whether there is clear and convincing evidence to show that these Defendants acted recklessly, in other words, were they aware of the substantial risks that Mr. Myers would incur by failing to do what they failed to do here and by doing what they shouldn't have done here, and did

they know and understand that it was likely to cause him harm, because if they did, under the instruction the Judge is going to give you, that's reckless conduct.

Are punitive damages warranted to punish these Defendants and to deter this conduct from damaging and injuring (sic) any other person in this facility? Please answer yes, so that all these Defendants in this case...will hear you loud and clear.

Send them a message...that this kind of conducts (sic) not only falls below appropriate standards, it is reckless and outrageous, never to be repeated in this community again.

The trial court's August 17 order stated that:

[t]he court finds no error in permitting the Plaintiffs' counsel to make a "send a message" argument during closing argument provided that it fell within the jury instructions. While Plaintiffs' counsel should not have used the phrase "send a message," his argument was within the law provided in the jury instructions and the defense counsel made no objection at the time the argument was made.

Among the issues to be resolved by the jury was defendants' liability for the injuries suffered by Mr. Myers and whether defendants' conduct rose to the level of recklessness sufficient to justify an award of punitive damages. The trial court found no error in permitting the argument in the context in which it was made and we do not find that the trial court abused its discretion in that regard.

8. Evidence and Argument Admitted in a Trial Governed by the MMA

Lastly, the defendants assert that they are entitled to a new trial because the trial court admitted evidence which was improper for a trial governed solely by the MMA. The defendants assert that this evidence includes evidence of Mr. Myers' hygiene; the care of other Facility residents; the certification, training, and performance evaluation of the CNAs; the testimony of CNAs regarding short-staffing at the Facility; the testimony of a non-medical witness regarding medical causation of injuries; and the suggestion of a dollar value of plaintiffs' claim.

As was discussed in Section IV B, we agree with the trial court that this matter contained both a claim for general negligence and for medical malpractice. As such, the trial court did not err in admitting evidence of general negligence that the defendants allege was inadmissible for the medical malpractice claim.

D. The Award of Compensatory Damages

Having determined that the trial court did not err in admitting the evidence and argument complained of by defendants, we turn to consideration of defendants' assertion that the amount of non-economic compensatory damages awarded¹⁴ is unreasonably excessive so as to "shock the judicial conscience" and require a remittitur.¹⁵ In our consideration of this issue, we are mindful of the substantial deference we are called to give to the verdict of the jury, which heard the evidence, observed the witnesses, was properly charged, performed its responsibility and whose verdict was approved by the trial court.

Appellate review of a compensatory damage award approved by the trial court involves a determination into whether there is any material evidence to support the verdict. Tenn. R. App. P 13. This review questions "whether material evidence can be found in the record that would support an award...as being at or above the lower limit of the range of reasonableness, giving full faith and credit to all of the evidence that tends to support that amount." *Poole v. Kroger Co.*, 604 S.W.2d 52, 54 (Tenn. 1980); *accord Southern R. R. Co. v. Sloan*, 407 S.W.2d 205, 209 (Tenn. Ct. App. 1965). An appellate court does not reweigh the evidence against a preponderance of the evidence standard. *Barnes v. Goodyear Tire and Rubber Co.*, 48 S.W.3d 698, 704 (Tenn. 2000); *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 718 (Tenn. Ct. App. 1999). Rather, the appellate court will "(1) take the strongest legitimate view of all the evidence in favor of the verdict; (2) assume the truth of all evidence that supports the verdict; (3) allow all reasonable inferences to sustain the verdict; and (4) discard all [countervailing] evidence." *Marshall v. Cintas Corp., Inc.*, 255 S.W.3d 60, 72 (Tenn. Ct. App. 2007) (citing *Crabtree Masonry Co. v. C & R Constr., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978)).

In considering whether a verdict is excessive, the Tennessee Supreme Court instructs as follows:

There is no yardstick, or measurement, which this court may use as a guide to determine the size of verdicts which would should [sic] be permitted to stand in cases of this kind. Each case must depend upon its own facts and the test to be applied by us is not what amount the members of the court would have awarded had they been on the jury, or what they, as an appellate court, think should have been awarded, but whether the verdict is patently excessive. The amount of damages awarded in similar cases is persuasive but not conclusive, and, in evaluating the award in other cases,

¹⁴ Defendants do not contest the awards of economic damages.

¹⁵ The verdict form asked the jury to make separate determinations in regard to compensatory damages: (1) to determine whether "there was medical malpractice [negligence] on the part of [each defendant] that was a cause of damages or injuries sustained by Cheatum Myers?" and (2) if so, to state the amount of damages. Other than as set forth in Section IV B, *supra*, the defendants have not raised an issue as to the jury's first determination that each defendant is liable for damages under the negligence and medical malpractice claims; rather the defendants only take issue with the amount of damages awarded in the jury's second determination.

we should note the date of the award, and take into consideration inflation and the reduced value of the individual dollar.

Ellis v. White Freightliner Corp., 603 S.W.2d 125, 129 (Tenn. 1980) (citing *Southern R. R. Co.*, 407 S.W.2d at 211). “[A] finding of excessiveness necessarily involves a determination of the dollar figure that represents the point at which excessiveness begins, and that figure is the upper limit of the range of reasonableness.” *Id.*

“[W]hen the trial judge has approved the verdict, the review in the Court of Appeals is subject to the rule that if there is any material evidence to support the award, it should not be disturbed.” *Ellis*, 603 S.W.2d at 129. This Court has held that:

When asked to determine whether a verdict should be set aside based on the amount of the damage award alone, the courts must consider the nature and extent of the plaintiff’s injuries, the pain and suffering the plaintiff experienced, the expenses the plaintiff incurred as a result of the injuries, the plaintiff’s loss of earning capacity as a result of the injuries, the impact the injuries have had on the plaintiff’s enjoyment of life, and the plaintiff’s age and life expectancy.

Duran v. Hyundai Motor America, Inc., 271 S.W.3d 178, 212 (Tenn. Ct. App. 2008).

“‘[T]he determination of such non-pecuniary losses as pain and suffering damages involves a subjective element not present in the determination of ordinary facts. The jury trial guarantee requires that the subjective element involved be that of the community and not of judges.’” *Duran*, 271 S.W.3d at 212 n.34 (quoting Case Comment, *Pennsylvania Supreme Court Reduces Jury Verdict Without Granting Plaintiff Alternative of a New Trial*, 113 U. Pa. L.Rev. 137, 141 (1964)). “Damages for pain and suffering and for the loss of enjoyment of life are not easily quantified and do not lend themselves to easy valuation.” *Id.* at 210. “[D]etermining the amount of these damages is appropriately left to the sound discretion of the jury or the judicial finder-of-fact.” *Id.* at 210-11. “When appellate courts are called upon to review a jury’s award of non-economic damages, it is not their prerogative to determine whether the award strikes them as too high or too low.” *Id.* at 211. “Rather, the reviewing court must review the evidence in the record ‘to determine whether material evidence supports a finding that the jury award is within the range of reasonableness and not excessive.’” *Id.* (quoting *Dunn v. Dunn*, 2007 WL 674652 at *9 (Tenn. Ct. App. Mar. 6, 2007)).

We begin with a presumption that the jury which heard this case was “honest and conscientious and . . . followed the instructions given to them.” *Duran*, 271 S.W.3d at 212. In considering the awards of non-economic compensatory damages, i.e., pain and suffering,¹⁶ loss of

¹⁶ Pain and suffering encompasses the physical and mental discomfort caused by an injury. It includes the “wide array of mental and emotional responses” that accompany the pain, characterized as suffering...; such as anguish, distress, fear, humiliation, grief, shame, or worry... *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694 (Tenn. Ct. App. 1999).

the ability to enjoy life¹⁷ and disfigurement,¹⁸ the jury was charged using the Tennessee Pattern Instructions.¹⁹ We have been referred to nothing in the record and our examination reveals nothing to show that the jury did not follow the instructions it was given; the trial court approved the jury's verdict.

In addition to relying on a comparison to similar cases, the defendants point to Mr. Myers' age, life expectancy, and pre-existing conditions in support of their argument that the amount of compensatory damages awarded exceeds the upper range of reasonableness. Defendants' expert witness, Dr. James Powers, testified that Mr. Myers suffered from a pre-existing deterioration of his physical health prior to admission to the Facility, which included stroke, heart attack, emphysema, pneumonia, osteoporosis, urinary tract infections, and malnutrition. Dr. Powers also stated that Mr. Myers suffered from pre-existing deterioration of his mental health, which included depression and dementia. Dr. Powers was asked, given this medical history, if he had an opinion about Mr. Myers' prognosis at the time of his admission to the Facility, and he testified that "[t]here was evidence of poor nutrition, bad lung disease, past hospitalizations, stroke,...heart attack,...pneumonia, his life expectancy would be greatly reduced, and I would put it at less than two years."

In their contention that the award of compensatory damages is excessive, defendants do not distinguish between the separate awards for the negligence and malpractice claims. Since the jury made separate awards, however, our analysis will be of each award.²⁰ The jury was given separate instructions on compensatory damages for the negligence and medical malpractice claims and each instruction included the following language:

If you decide that the plaintiffs are entitled to damages under the medical malpractice [negligence] claim, you must fix an amount that will reasonably compensate that party for each of the following elements of claimed loss or harm, if you find it was suffered by that party and was caused by the act or omission upon which you base your finding of fault.

¹⁷ Damages for loss of enjoyment of life compensate the injured person for the limitations placed on his or her ability to enjoy the pleasures and amenities of life. This type of damage relates to daily life activities that are common to most people. It can also compensate a victim for the loss of uncommon individual pursuits or talents. The policy underlying the award of loss of enjoyment damages is of making the victim whole in the only way a court can—with an equivalent in money for each loss suffered. *Overstreet*, 4 S.W.3d 694, 715-16.

¹⁸ A permanent injury differs from pain and suffering in that it is an injury from which the plaintiff cannot completely recover. It prevents a person from living his or her life in comfort by adding inconvenience or loss of physical vigor. Disfigurement is a specific type of permanent injury that impairs a plaintiff's beauty, symmetry, or appearance. Permanent injury may relate to earning capacity, pain, impairment of physical function or loss of the use of a body part..., or to a mental or psychological impairment. *Overstreet*, 4 S.W.3d 694, 715-16.

¹⁹ T.P.I. - Civil 14.01, 3.50, 14.10, 14.11 and 14.14.

²⁰ As to the appropriateness of allowing both causes of action to proceed, see Section IV B, *supra*.

Each of these elements of damage is separate. You may not duplicate damages for any element by also including that same loss or harm in another element of damage. Likewise and damages awarded on the medical malpractice [negligence] claim must not be duplicated in the award for negligence [medical malpractice] claim.²¹

Each award must be evaluated individually to determine whether that particular award exceeds the upper limit of reasonableness. In making this determination, we consider the awards made to plaintiffs in similar cases. We are also aware, as was the jury and the trial court, of the age and life expectancy of Mr. Myers, his medical history and condition prior to admission to the facility.

In *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694 (Tenn. Ct. App. 1999), the plaintiff was a patron of the defendant restaurant when a shard from a broken dinner plate struck the plaintiff's left eye. *Id.* at 700. The plaintiff underwent five surgeries, but still lost sight in that eye. *Id.* at 701. The injury also caused disfigurement to her face, which in turn caused emotional damages. *Id.* The jury awarded the plaintiff \$250,000 for pain and suffering, \$1,250,000 for permanent impairment and/or disfigurement, and \$250,000 for loss of enjoyment of life. *Id.* at 716. On appeal, the verdict was affirmed as the court found that sufficient evidence existed in the record to support the award. *Id.* at 719.

In *Duran v. Hyundai Motors America, Inc.*, 271 S.W.3d 178 (Tenn. Ct. App. 2008), a healthy, 50 year old woman suffered severe and permanent injuries due to a malfunction in her automobile. *Duran*, 271 S.W.3d at 186. The plaintiff suffered from second and third degree burns on her skin, breathing problems, and lung disease. *Id.* at 186-87. Experts at trial predicted that she would require the use of a wheelchair within 5 years. *Id.* at 187. The jury returned a verdict in the amount of \$1,650,000 for total pain and suffering, \$1,150,000 for loss of ability to enjoy life, and \$200,000 in medical expenses. *Id.* at 189. On motion of defendants, the trial court remitted the compensatory award to \$2,000,000; at the same time, the trial court denied plaintiff's motion to increase the *ad damnum* to conform to the jury's award. *Id.* The judgment was affirmed on appeal, with this court finding material evidence to support the balance of the award, totaling \$1,958,543.14. *Id.* at 211-12.

In *Russell v. Crutchfield*, 988 S.W.2d 168 (Tenn. Ct. App. 1998), the plaintiff was a 23 year-old who suffered from a leakage of bile caused by defendant's error during surgery. *Russell*, 988 S.W.2d at 170. The jury awarded the plaintiff \$1,000,000 and the trial court reduced the award to \$900,000. *Id.* One of the defendant's issues on appeal was that "the evidence preponderates against the verdict as adjusted by the trial court"; this Court affirmed the remitted amount, finding that "[t]he record demonstrates that plaintiff suffered substantial pain after the operation." *Id.* at 170-71.

In *Palanki v. Vanderbilt Univ.*, 215 S.W.3d 380 (Tenn. Ct. App. 2006), an otherwise healthy, 11 month old child underwent a surgical procedure to correct a condition known as hydroceles. *Palanki v. Vanderbilt Univ.*, 215 S.W.3d 380, 384 (Tenn. Ct. App. 2006). During the procedure, the

²¹ This is the instruction at T.P.I. 3 - Civil 14.01.

doctor negligently removed ninety percent of the plaintiff's bladder. *Id.* Because of this, the plaintiff was required to undergo additional surgeries and was forced to live the remainder of his life with physical limitations, including the required use of a catheter due to his inability to urinate spontaneously. *Id.* The jury awarded \$15,000,000 in non-economic damages, but the trial court remitted the entire award to \$6,500,000. *Id.* at 384-85. The remittitur was affirmed on appeal, with this court determining that the preponderance of the evidence was not contrary to the action of the trial court. *Id.* at 387, 389.

The applicability of *Palanki* and *Russell* to our analysis in this case is somewhat limited, as both involved this court's review of the action of the trial court in remitting the damages awarded by the jury; also, the cases do not say whether the jury assessed damages separately for loss of enjoyment of life, pain and suffering or disfigurement, although there were elements of each item of damage in both cases. The cases are useful, however, in showing an upper limit of reasonableness.

1. Damages Awarded for Medical Malpractice

The jury awarded \$3,281,839.09 on the medical malpractice claim, including \$2,000,000 for pain and suffering, \$700,000 for loss of the ability to enjoy life, \$500,000 for disfigurement and \$81,839.08 for medical care/services.

We find the award for loss of ability to enjoy life under the medical malpractice claim to be supported by evidence. An award for loss of ability to enjoy life compensates a person for "limitations placed on his or her ability to enjoy the pleasures and amenities of life." *Overstreet*, 4 S.W.3d at 715. Despite Mr. Myers' age and pre-existing condition, he was entitled to enjoy what remained of his life and was entitled to be compensated for the limitations placed upon his ability to do so as a result of the defendants' conduct. The injuries and illness Mr. Myers suffered as a result of the defendants' conduct, i.e., the pressure sores, contractures, hip fracture and urinary tract infections, are evidence of the reduced quality of life Mr. Myers' endured following his admission to the Facility.

In addition, we find the award for disfigurement under the medical malpractice claim to be supported by the evidence. A person is entitled to compensation if they suffer a "permanent injury that impairs [the individual's] beauty, symmetry, or appearance." *Overstreet*, 4 S.W.3d at 715. The jury was presented with evidence of the contractures and pressure sores that Mr. Myers suffered. The plaintiffs testified that the contractures were so bad that it was difficult to place Mr. Myers in his coffin. The plaintiffs' expert testified that the pressure sores devoured the skin, reaching the bone. In light of this evidence, we find the jury's award for disfigurement to be reasonable.

While the amount awarded for pain and suffering for medical malpractice may appear to be high, we find that the award is supported by evidence and is not excessive. The defendants' malpractice during Mr. Myers' residency caused him to suffer from a number of medical problems, including the contractures, pressure sores, hip fracture, and urinary tract infection. Malpractice was

found by the jury and is supported by the record. It is not our function to determine if we would make a different award than that of this jury; rather, we are required to test whether the award is supported by evidence and within the range of reasonableness. *Duran*, 271 S.W.3d at 211. As noted earlier, an award for pain and suffering is not easily quantified and the amount of damages awarded should be left to the sound discretion of the jury to make a subjective determination in reaching an appropriate figure. *Id.* at 210-12. We acknowledge the factors which would weigh against the jury's award, i.e., Mr. Myers' age and pre-existing conditions; however, we do not find these factors to overcome the discretion this Court affords a jury in making a subjective damage award and we do not assume that the jury did not take them into account in making its award. Upon a review of the record, we find that the award is sufficiently supported by evidence and does not exceed the upper limit of reasonableness.

2. Damages Awarded for Negligence

The jury awarded compensatory damages in the amount of \$820,459.77 on the negligence claim, including \$450,000 for pain and suffering, \$275,000 for loss of the ability to enjoy life, \$75,000 for disfigurement, and \$20,459.77 for medical care/services.

In *Overstreet, supra.*, the jury made separate awards of pain and suffering, permanent impairment/disfigurement and loss of enjoyment of life and in *Duran* the jury made separate awards for pain and suffering and loss of the ability to enjoy life. In neither case did either the trial or the appellate court find the awards to be excessive; not having found the awards to be excessive, then, the upper limit of reasonableness was not reached in either case. See *Ellis v. White Freightliner Corp.*, 603 S.W.2d 125, 129 (Tenn. 1980).

We find the award for loss of ability to enjoy life under the negligence claim to be supported by evidence. As stated earlier, Mr. Myers was entitled to enjoy what time remained of his life and was entitled to be compensated for the limitations placed upon his ability to do so as a result of the defendants' conduct. While a resident at the Facility, Mr. Myers was left to sit in his own waste for periods at a time, received insufficient bathing, and infrequent grooming; these conditions directly affected his enjoyment of life. We find the jury's award to be sufficiently supported by the evidence of the deficient treatment to which Mr. Myers was subjected.

We do not find the jury's award of damages for disfigurement under the negligence claim to be supported by the evidence. Disfigurement is a "specific type of permanent injury that impairs a plaintiff's beauty, symmetry, or appearance," *Overstreet*, 4 S.W.3d 694, 715, and there is no proof that Mr. Myers suffered such a permanent condition as a result of the ordinary negligence of Facility employees. Consequently, this portion of the award must be vacated.

Lastly, we find that the award for pain and suffering under the negligence claim to be supported by the evidence. Due to Mr. Myers' physical condition, he was dependent upon the defendants for a number of ordinary tasks, such as bathing, feeding, grooming, and mobility. There is evidence that the defendants' failure to fulfill these obligations resulted in continuous and

substantial suffering that Mr. Myers endured during his residency at the Facility. The plaintiffs testified that, during visits, they would find Mr. Myers unshaven, poor smelling, with long, dirty fingernails, living in a room with a foul odor, and occasionally languishing in his own feces. The defendants' conduct rendered Mr. Myers helpless and deprived him of his dignity. In light of this evidence, we find the jury's award for pain and suffering to be sufficiently supported.

While Mr. Myers' age and pre-existing physical and mental condition may have reduced his life expectancy, there was material evidence in the record for the jury to conclude that the defendants' actions or inactions directly affected the quality of the life he lived over the last sixteen months of his life, caused him disfigurement, and caused him pain and suffering or exacerbated that which may have preceded his admission to the Facility.²² Unlike the plaintiffs in the cases cited above, whose injuries and damages stemmed from a specific incident (e.g., an operation or an accident), the treatment to which Mr. Myers was subjected was continuous and enduring. The amount of the compensatory damage award for injuries caused by the ordinary negligence of employees of the Facility and malpractice reflects the jury's consideration of how those actions and inactions affected Mr. Myers. The awards are not excessive in comparison to the amount of damages awarded to the plaintiffs in the other cases and, with the exception of the award for disfigurement caused by negligence, are supported by material evidence in the record.

E. Extraneous Prejudicial Information in the Jury Deliberations

The defendants argue that the trial court erred in denying their motion for new trial because the jury received extraneous prejudicial information that altered the verdict. We agree with the trial court's denial of the motion for new trial because the jury deliberations were not prejudiced.

A jury's verdict is to be free from extraneous prejudicial information. *Terry v. Plateau Elec. Co-Op.*, 825 S.W.2d 418, 423 (Tenn. Ct. App. 1991). Extraneous information is considered "information from a source outside the jury." *State v. Coker*, 746 S.W.2d 167, 171 (Tenn. 1987); *Caldararo by Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738, 742 (Tenn. Ct. App. 1990). When a party inquires into the validity of a verdict, jurors "may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror..." Tenn. R. Evid. 606.

This Court in *Caldararo by Caldararo v. Vanderbilt Univ.*, 794 S.W.2d 738 (Tenn. Ct. App. 1990) held that

It is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Thus, it would be unreasonable, and perhaps unwise, to expect juries to be completely sterilized and free from any external influences. The jurors' various attitudes, philosophies, experiences, and backgrounds are the "very human elements that constitute one of the strengths of the jury system."

²² See T.P.I. Civil 14.14.

Caldararo by Caldararo, 794 S.W.2d 738 at 743-44 (internal citations removed). The defendants rely on this case to support their contention by pointing to a footnote which states “[o]f course, extraneous information could enter the jury room through the mouth of a juror. Thus, there might have been a reason to grant a new trial had [the juror] discussed the case with his wife...” *Id.* at 744 (internal citations omitted).

In the present case, the juror in question admitted that his wife, whose occupation as a nurse was revealed during voir dire, gave her opinion on issues of the case during the proceedings. The juror stated that he did not repeat these statements to the rest of the jury, and said that when his wife would try to engage him in discussion, he refused to speak with her.²³ The trial court then questioned the remainder of the jurors about any extraneous information and none responded that there had been any extraneous contact with them. There was no other evidence of any contact with any juror. In light of the evidence, the trial court determined that the juror’s conduct was not inappropriate and did not result in extraneous prejudicial information reaching the jury.²⁴

We agree with the trial court’s denial of the motion for new trial. As this Court stated in *Caldararo by Caldararo*, it is unreasonable to expect that jurors will be shielded from external influences. Here, the juror testified that he refused to discuss the case with his wife, and that he did not reveal any information he may have received to other jurors. We find that such conduct did not prejudice the jury’s deliberations, and that the trial court’s denial of the motion for new trial was proper.

F. Punitive Damages

The standard for awarding punitive damages has been set by the Tennessee Supreme Court in *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992). The purpose of punitive damages is “not to compensate the plaintiff but to punish the wrongdoer and to deter the wrongdoer and others from committing similar wrongs in the future.” *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900 (Tenn. 1992); *accord Miller v. United Automax*, 166 S.W.3d 692, 697 (Tenn. 2005). Punitive damages can only be awarded when there is a finding, by clear and convincing evidence, that the defendant acted either intentionally, fraudulently, maliciously, or recklessly. *Culbreath v. First Tenn. Bank Nat. Ass’n*, 44 S.W.3d 518, 527 (Tenn. 2001); *Hodges*, 833 S.W.2d at 901. A showing of clear and convincing evidence requires “evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hodges*, 833 S.W.2d at 901 n.3.; *accord Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005).

1. Punitive Damage Award Against NHC/McMinnville

²³ After the juror testified regarding the extraneous information, the trial court addressed him, stating that his “conduct during the trial was very appropriate. You did exactly what you were supposed to do, and I thank you for that.”

²⁴ The trial court stated that “...I obviously find from the testimony here today from the jurors that, at this time, I find no – there is no reasonable probability that any conversations or comments that were extraneous to the proof were introduced to the jury room and would have affected the outcome of the trial.”

The defendants argue that the punitive damage award of \$163,402 against NHC/McMinnville was not supported by clear and convincing evidence of recklessness. The plaintiffs claim that sufficient evidence exists in the record to support the jury verdict.

The standard of an appellate review of a punitive damage award requires a two step process. *Flax v. DaimlerChrysler Corp.*, 2008 WL 2831225 at *30 (Tenn. July 24, 2008). The first step is to determine whether “[the record] contains material evidence that supports a finding by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly.” *Id.* On appeal, a court “must determine whether the jury could reasonably have been persuaded that the required factual findings were proved to be highly probable.” *Id.* A heightened standard of review is required on appeal due to the use of a heightened burden of proof at the trial level.²⁵ *Id.* If the first step is met, the second step requires “the appellate court to engage in an exacting appellate review to ensure that the punitive damages award is based on an application of the law rather than the decision-maker’s caprice.” *Id.* at 31.

The first step of the analysis requires a look into the record for material evidence in support of the jury’s finding of recklessness. Recklessness is defined as when a “person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.” *Cf.* Tenn. Code. Ann. § 39-11-302(c) (1991) (criminal definition of “reckless”); *see Hodges*, 833 S.W.2d at 901. At trial, the plaintiffs relied upon the understaffing situation at the Facility to prove recklessness. Multiple CNAs testified about the understaffing problem and how management failed to rectify the situation after it was consistently notified of the situation. The plaintiffs proved that (1) the Facility was aware of the inadequate staffing, (2) the Facility knew that the understaffing would lead to decreased care for the residents, and (3) the Facility knew that less employees would lead to higher profits. It is possible for a jury to find such conduct to be reckless.

Under the second step of the analysis, we must determine whether the jury applied the law or their caprice in setting the amount of the award. The punitive damage award of \$163,402 against NHC/McMinnville amounts to less than 4% of the total compensatory award of \$4,102,298.86. A punitive award of this proportion is not the product of the jury’s caprice. The punitive damage award against NHC/McMinnville was based on the appropriate application of the law, and not a result of the jury’s caprice; the award is affirmed.

2. Punitive Damage Award Against NHC and National

²⁵ Punitive damages require a clear and convincing evidence standard, while the preponderance of the evidence standard is used to review compensatory damages. “The preponderance of the evidence standard requires that the truth of the facts asserted be more probable than not, whereas the clear and convincing evidence standard requires that the truth be highly probable.” *Teter*, 181 S.W.3d at 341.

a. *The Directed Verdict Motion*

The plaintiffs appeal the trial court's grant of a directed verdict motion on the issue of punitive damages against NHC and National and ask this Court to reverse the decision. The defendants assert that the trial court was proper in directing the verdict in their favor, and ask this Court to uphold the trial court's determination.

An appellate court will review a directed verdict motion *de novo*, and will apply the same legal standard as the trial court. *Biscan v. Brown*, 160 S.W.3d 462, 470 (Tenn. 2005); *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 281 (Tenn. 2005). This review requires an appellate court to "take the strongest legitimate view of the evidence in favor of the plaintiff, indulging in all reasonable inferences in his favor, and disregarding any evidence to the contrary." *Cecil v. Hardin*, 575 S.W.2d 268, 270 (Tenn. 1978); *accord Brown*, 181 S.W.3d at 281; *accord Childress v. Currie*, 74 S.W.3d 324, 328 (Tenn. 2002). A trial court's grant of a directed verdict motion is appropriate if the court "determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence." *Biscan*, 160 S.W.3d at 470; *Childress*, 74 S.W.3d at 328.

The defendants moved for a directed verdict on the issue of punitive damages at the conclusion of all the evidence, which the trial court granted. We find that the standard the trial court used in granting the motion was incorrect. The trial court's language in granting the motion suggested that the decision was based on personal conclusions, rather than whether reasonable minds could differ as to the conclusions to be drawn from the evidence.²⁶ As such, the analysis applied by the trial court in granting the directed verdict motion was error.

Furthermore, the record on appeal contains sufficient questions regarding the defendants' liability for punitive damages to warrant the issue being submitted to the jury. "A directed verdict should not be granted if the party with the burden of proof has presented sufficient evidence to create an issue of fact for the jury to decide." *Burton v. Warren Farmers Co-op.*, 129 S.W.3d 513, 520 (Tenn. Ct. App. 2002); *accord White v. Vanderbilt Univ.*, 21 S.W.3d 215, 231 (Tenn. Ct. App. 1999). During trial, the plaintiffs suggested that NHC and National were either responsible for or had indirectly caused the insufficient staffing at the Facility. A reasonable jury could return a finding of recklessness if it believed that NHC and National controlled staffing levels at the Facility with the knowledge that understaffing would adversely affect the residents. We find that reasonable minds

²⁶ In ruling on the directed verdict motion, the trial court stated:

...I cannot find that their actions or inactions were reckless in what they did. They did meet the minimum state standards. I'm not sure that what they knew and what they didn't do because of it was grossly inadequate or reckless in the terminology that we are required to use.

The people there at the facility, yes, I think the people - the manager there at the facility, yes, we can say that there is sufficient evidence to warrant punitive damages. I simply cannot find that there is clear and convincing evidence of reckless and/or gross deviations by the above corporations.

could differ as to the conclusions to be drawn from the evidence, and that a question of fact existed to be resolved by the jury.

Even if the trial court had applied the correct standard and had found that reasonable minds could not differ as to the lack of NHC and National's *actual* recklessness, the directed verdict was still improper since the jury could have found NHC and National to be *indirectly* liable as principal and employer. *Memphis St. Ry. Co. v. Stratton*, 176 S.W. 105, 106 (Tenn. 1915). The Tennessee Supreme Court in *Memphis St. Ry. Co. v. Stratton*, 176 S.W. 105 (Tenn. 1915) upheld an award of punitive damages against an employer for the willful and wanton conduct of an employee since a decision to the contrary would forever bar the imposition of punitive damages upon a corporation. The Court adopted the observations of the Mississippi Supreme Court when it concluded that:

The judge-made law of punitive damages is not the result of logic, but of public necessity, as text-writers and courts have repeatedly shown. If corporations--artificial beings who can act only through agents and servants in their varied and multitudinous and constantly recurring business dealings with the public--can never be held liable in punitive damages for the acts of their servants unless expressly authorized by them, unless expressly ratified by them, no matter how gross and outrageous the wrongful act of the servant, we feel perfectly safe in declaring that no recovery for more than mere compensatory damages will ever again be awarded against corporations. Corporations never expressly authorize their servants to beat or insult or outrage those having business relations with them, and they rarely ratify such conduct. Having, by the constitution of their being, to act solely by agents or servants, they must, as matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrongs while performing the master's business and in the scope of their employment, and this to the extent of liability for punitive damages in proper cases.

Id. As such, we find the trial court's grant of the directed verdict motion on the issue of punitive damages to be error as the jury could have imposed the reckless conduct of the Facility's staff (1) upon NHC under its principal-agent relationship with the Facility, and (2) upon National under its employer-employee relationship with the staff.

The directed verdict motion granted in favor of NHC and National on the issue of punitive damages was improper as (1) an incorrect analysis was used, (2) reasonable minds could differ as to recklessness of NHC and National's actions, and (3) liability could have been imposed indirectly upon the entities in their role as either principal or employer. Whether NHC and National were reckless in their conduct is a question which should have been left for the jury to resolve.

b. The Jury's Verdict

Following the grant of the directed verdict motion, the trial court nevertheless allowed the jury to consider the issue of liability and an award for punitive damages against NHC and National in the event that the directed verdict was reversed on appeal. The plaintiffs assert that the jury's finding of liability for punitive damages and the punitive damage award are valid and should be reinstated. The defendants assert that the grant of the directed verdict motion rendered the issue of punitive damages moot; thus any subsequent jury findings on the issue were invalid advisory opinions.

When a court grants a directed verdict motion, the "consequence...is that the jury is taken out of the equation..." *Blackburn v. CSX Transp., Inc.*, 2008 WL 2274897 at *15 (Tenn. Ct. App. May 30, 2008). Tenn. R. Civ. P. 50.01 states that "[t]he order of the court granting a motion for a directed verdict is effective without any assent of the jury." Tenn. R. Civ. P. 50.01. Tennessee does not allow courts or juries to render an advisory opinion. *State v. Rodgers*, 235 S.W.3d 92, 97 (Tenn. 2007); *State ex rel. Lewis v. State*, 347 S.W.2d 47, 48 (Tenn. 1961); *Brandy Hills Estates, LLC v. Reeves*, 237 S.W.3d 307, 318 (Tenn. Ct. App. 2006). "[T]he practice followed by most all courts, if not all, is shown to be, unless there is in existence a legal right, that the courts will not determine the matter, because when the question involved in the action as originally brought is no longer in existence it has become moot." *Lewis*, 347 S.W.2d at 48. The Tennessee Supreme Court adopted the reasoning of District Court of the Northern District of California, which stated:

However convenient or desirable for either party that the questions mooted in the case be authoritatively settled for future guidance, the court is not justified in violating fundamental principles of judicial procedure to gratify that desire. To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights, and although the case may have originally presented such a controversy, if before decision it has, through act of the parties or other cause, lost that essential character, it is the duty of the court, upon the fact appearing, to dismiss it.

Lewis, 347 S.W.2d at 48 (citing *Southern Pac. Co. v. Eshelman*, 227 F. 928, 932 (D.C. Cal. 1914)); *Rodgers*, 235 S.W.3d at 97.

By granting the directed verdict motion, the jury was taken out of the equation and the issue of punitive damages against NHC and National no longer remained a "genuine and existing controversy" in the trial. The trial court's decision to allow the jury to consider punitive damages after it granted the directed verdict motion was an attempt to settle a mooted issue for future guidance; the Tennessee Supreme Court has stated that doing so is a violation of judicial procedure. Thus, the jury's findings on the punitive damage issue were improper advisory opinions, which are not recognized in this state. As such, the jury's finding of liability for and award of punitive damages against NHC and National cannot be reinstated and the issue is remanded to the lower court for a rehearing on both phases of the bifurcated punitive damage trial.

G. Discretionary Costs

The defendants' final issue on appeal is that the trial court erred in awarding discretionary costs for the preparation of the trial transcript for appeal.²⁷ The defendants argue that Tenn. R. App. P. 40(c) reserves the discretion to award such costs in the appellate court, and that the trial court erred in making the award pursuant to Tenn. R. Civ. P. 54.04. We agree that the costs of preparing the trial transcript for appeal do not fall within the discretion of the trial court.

Costs awarded in accordance with Tenn. R. Civ. P. 54.04, like awarding other costs, are within the trial court's reasonable discretion. *Perdue v. Green Branch Min. Co., Inc.*, 837 S.W.2d 56, 60 (Tenn. 1992). As such, this Court employs a deferential standard when reviewing a trial court's decision either to grant or to deny a motion pursuant to this rule. *Scholz v. S.B. Int'l, Inc.*, 40 S.W.3d 78, 84 (Tenn. Ct. App. 2000). Because these decisions are discretionary, this Court is generally disinclined to second-guess a trial court's decision unless the trial court has abused its discretion. *Woodlawn Mem'l Park, Inc. v. Keith*, 70 S.W.3d 691, 698 (Tenn. 2002); *Stallworth v. Grummons*, 36 S.W.3d 832, 836 (Tenn. Ct. App. 2000); *Mitchell v. Smith*, 779 S.W.2d 384, 392 (Tenn. Ct. App. 1989).

The "abuse of discretion" standard of review calls for a less intense appellate review and, therefore, less of likelihood that the trial court's decision will be reversed. *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000); *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999). Appellate courts do not have the latitude to substitute their discretion for that of the trial court. *Myint v. Allstate Ins., Co.*, 970 S.W.2d 920, 927 (Tenn. 1998); *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Thus, a trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn. 2001), and reasonable minds can disagree about its correctness. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000). Discretionary decisions must, however, take the applicable law and the relevant facts into account. *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996). Accordingly, a trial court has "abused its discretion" when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party. *Woodlawn Mem'l Park, Inc. v. Keith*, 70 S.W.3d at 698; *Clinard v. Blackwood*, 46 S.W.3d 177, 182 (Tenn. 2001); *Wilder v. Wilder*, 66 S.W.3d 892, 895 (Tenn. Ct. App. 2001); *Robinson v. Clement*, 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001).

The trial court awarded discretionary costs to the plaintiffs on a Motion for Costs under Tenn. R. Civ. P. 54.04 which states:

²⁷ The trial court's order awarded discretionary costs in the amount of \$39,709.15, with the cost of expedited transcripts listed as \$9,926.90. In their brief, the defendants ask for the cost of trial transcripts in the amount of \$19,175, but does not explain the discrepancy with the trial court's order. The award will be adjusted according to the trial court's figures.

(1) Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs. . .

(2) Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs. . . .

Tenn. Rule Civ. P. 54.04. The lower court's discretionary award included, among other things, the cost for preparation of the trial transcript for appeal. Nowhere in Rule 54.04(2)'s inclusive list is this cost provided for. Rather, the cost is found under Tenn. R. App. P. 40(c) which states that "[r]ecoverable costs on appeal include the cost of preparing and transmitting the record..." Tenn. R. App. P. 40(c).

Furthermore, the Tennessee Supreme Court has held that Tenn. R. App. P. 40(c) provides for the cost of preparing a trial transcript necessary for appeal to be recoverable by the successful party *on appeal*, not at trial. *Smith v. Watts*, 625 S.W.2d 712, 712 (Tenn. 1981). This Court subsequently held that "[a]fter the Tennessee Supreme Court's decision in *Smith v. Watts*..., it can no longer be reasonably argued that the costs of preparing the transcript are not part of the costs to be taxed *on appeal* pursuant to Tenn. R. App. P. 40(c) or that the taxation of these costs are within the domain of the appellate courts." *Rogers v. Russell*, 733 S.W.2d 79, 88 (Tenn. Ct. App. 1986) (emphasis added).

Lastly, this Court has held that "a party seeking [Tenn. R. Civ. P. 54.04(2)] costs must file a timely motion and must support this motion with an affidavit detailing these costs, verifying that they are accurate and *that they have actually been charged*, and that they are necessary and reasonable." *Mass. Mut. Life Ins. Co. v. Jefferson*, 104 S.W.3d 13, 36 (Tenn. Ct. App. 2002) (emphasis added). The preparation of trial transcripts for appeal can never be completed until after the conclusion of the lower court's proceedings; as such, these costs can never be "actually charged" at the time a trial court considers a Motion for Costs since the proceedings are still open.

An award for the cost of preparing trial transcripts for appeal is solely within the authority of an appellate court because it is available only under the rules of appellate procedure and because it cannot be charged until the trial proceedings have concluded. The award of such costs were outside the discretion of the trial court. The discretionary award of \$39,709.15 is modified to \$29,782.25 to correct the error.

V. Conclusion

For the reasons set forth above, we vacate the jury's award of \$75,000 for disfigurement on the claim of ordinary negligence and modify the award of discretionary costs. We reverse the trial court's order granting defendants a directed verdict on the issue of punitive damages and remand the case for a hearing on same. In all other respects, the judgment of the Circuit Court is affirmed.

The case is remanded to the Circuit Court for Warren County for further proceedings in accordance with the judgment of this Court.

RICHARD H. DINKINS, JUDGE